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No. 96-1133

Supreme Court, U.S.

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In The
Supreme Court Of The United States

October Term, 1996

—◆—
UNITED STATES OF AMERICA,

Petitioner,

v.

AIRMAN EDWARD G. SCHEFFER,

Respondent.

—◆—
ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

—◆—
BRIEF OF THE STATE OF CONNECTICUT AND
27 STATES AS AMICI CURIAE
IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The amici States seek reversal of the decision of the United States Court of Appeals for the Armed Services in *United States v. Scheffer*, 44 M.J. 442 (1996), which has been granted review by this Court. In holding that Military Rule of Evidence 707, barring use of polygraph evidence, violated the defendant's right to present a defense, the Court of Appeals misinterpreted and misapplied this Court's case law construing the right to present a defense. Because Rule 707 is analogous to the rules in many States barring the use of polygraph evidence in trial court proceedings, this Court's opinion in *Scheffer* will directly affect the validity of those rules. The amici States share a concern that the constitutional analysis embodied in *Scheffer*, if adopted by this Court, would have a significant and detrimental effect on the administration of criminal justice. Adoption of the *Scheffer* holding would constitute an unwarranted intrusion into the authority of state courts and legislatures to adopt the rules of evidence that will apply in their trial courts.

The admissibility of polygraph evidence has been considered by almost every State's appellate courts. In many States, reviewing courts have considered and rejected constitutional challenges to the exclusion of polygraph evidence. Adoption of the *Scheffer* holding would obliterate the years of experience that the States have had with this type of evidence and force them to abandon their well-developed policy considerations for excluding it. The experience of the States, as well as the policy reasons underlying their decisions to bar the use of such evidence, can and should inform this Court's consideration of the issue.

For these reasons, the amici States support Petitioner in seeking reversal of the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

The decision of the majority of States to bar the use of polygraph evidence is constitutionally sound because it is based on legitimate conclusions that such evidence is unreliable and overly prejudicial. The exclusion is based on conclusions that: the interpretation of polygraph tests is too subjective and the validity of test results has not been established; trial court resources that must be utilized to address and supervise such evidence render it too burdensome; and there is grave danger that polygraph evidence usurps the function of the jury to assess credibility. The right to present a defense must bow to the exclusion of polygraph evidence, because the exclusion is based on important interests in the administration of criminal law and procedure.

ARGUMENT

I. THE STATES' RULES EXCLUDING POLYGRAPH EVIDENCE IN TRIAL COURT PROCEEDINGS SUBJECT TO THE RULES OF EVIDENCE ARE COMMENSURATE WITH CONSTITUTIONAL PRINCIPLES

In *Scheffer*, the Court of Appeals held that Military Rule of Evidence 707's *per se* exclusion of polygraph evidence is unconstitutional, in that it violates a defendant's right to present a defense. The majority of States have an analogous exclusion of polygraph evidence.¹

¹ See *Pulakis v. State*, 476 P.2d 474 (Alaska 1970); *Haakanson v. State*, 760 P.2d 1030 (Alaska App. 1988); *People v. Anderson*, 637 P.2d 354 (Colo. 1981) (en banc); *State v. Porter*, 241 Conn. 57, 1997 WL 265202 (released May 20, 1997); *State v. Okamura*, 78 Haw. 383, 894 P.2d 80 (1995); *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996); *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991); *State v. Harnish*, 560 A.2d 5 (Me. 1989); *State v. Casale*, 110 A.2d 588 (Me. 1954); *State v. Hawkins*, 326 Md. 270, 604 A.2d 489 (1992); *Commonwealth v. Mendes*, 406 Mass. 201, 547 N.E.2d 35 (1989); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *State v. Anderson*, 379 N.W.2d 70 (Minn. 1985), cert. denied, 476 U.S. 1141 (1986); *State v. Biddle*, 599 S.W.2d 182 (Mo. 1980); *State v. Staat*, 248 Mont. 291, 811 P.2d 1261 (1991); *State v. Steinmark*, 195 Neb. 545, 239 N.W.2d 495 (1976); *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456 (1993); *State v. Ober*, 126 N.H. 471, 493 A.2d 493 (1985); *People v. Angelo*, 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996); *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *Fulton v. State*, 541 P.2d 871 (Okla. Crim. App. 1975); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984); *Commonwealth v. Brockington*, 500 Pa. 216, 455 A.2d 627 (1983); *In Re Odell*, 672 A.2d 457 (R.I. 1996); *State v. Dery*, 545 A.2d 1014 (R.I. 1988); *State v. Muetze*, 368 N.W.2d 575 (S.D. 1985); *Grant v. State*, 374 S.W.2d 391 (Tenn. 1961); *State v. Hart*, 911 S.W.2d 371 (Tenn.App. 1995); *Perkins v. State*, 902 S.W.2d 88 (Tex. App. 1995); *State v. Hamlin*, 146 Vt. 97, 499 A.2d 45 (continued...)

¹(...continued)

(1985); *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159 (1986); *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995); *State v. Dean*, 307 N.W.2d 628 (Wisc. 1981). The District of Columbia also bars the use of polygraph evidence. *Contee v. United States*, 667 A.2d 103, 104 (D.C. 1995).

Some States admit polygraph evidence only by stipulation of the parties. See *Ex Parte Clements*, 447 So.2d 695 (Ala. 1984); *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); *Holcomb v. State*, 268 Ark. 138, 594 S.W.2d 22 (1980), Ark. Code Ann. §12-12-704 (Repl. 1995); *People v. Fudge*, 7 Cal. 4th 1075, 875 P.2d 36, 31 Cal. Rptr. 2d 321 (1994), cert. denied, 115 S.Ct. 1367 (1995); Calif. Evid. Code §351.1 (Deering 1986); *Melvin v. State*, 606 A.2d 69 (Del. 1992); *Delap v. State*, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984); *Fargason v. State*, 266 Ga. 463, 467 S.E.2d 553 (1996); *State v. Fain*, 116 Idaho 82, 774 P.2d 252, cert. denied, 493 U.S. 917 (1989); *Sanchez v. State*, 675 N.E.2d 306 (Ind. 1996); *State v. Losee*, 354 N.W.2d 239, (Iowa 1984); *State v. Weber*, 260 Kan. 263, 918 P.2d 609 (1996); *Kazalyn v. State*, 825 P.2d 578 (Nev. 1992); *State v. McDavitt*, 62 N.J. 36, 297 A.2d 849 (1972); *City of Bismarck v. Berger*, 465 N.W.2d 480 (N.D. 1991); *State v. Souel*, 53 Ohio 2d 123, 372 N.E.2d 1318 (1978); *State v. Crosby*, 927 P.2d 638 (Utah 1996); *State v. Renfro*, 96 Wash. 2d 902, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982); *Schmunk v. State*, 714 P.2d 724 (Wyo. 1986).

A few states allow polygraph evidence to be admitted in certain proceedings. See *State v. Catanese*, 368 So.2d 975 (La. 1979) (post-trial proceedings); *State v. Wright*, 471 S.E.2d 700 (S.C. 1996) (at discretion of trial judge but generally should be excluded).

Mississippi and New Mexico allow admission of polygraph evidence, with restrictions, during a trial. *Connor v. State*, 632 So.2d 1239 (Miss. 1993) (admissible to rehabilitate impeached witness); *State v. Sanders*, 872 P.2d 870 (N.M. 1994) (admission authorized by N. M. Stat. Ann. §11-707).

A. States May Exclude Irrelevant, Unreliable Or Overly Prejudicial Evidence Without Infringing On A Defendant's Right To Present A Defense

The Due Process Clause limits the ability of the States to exclude evidence only when the exclusion "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-202, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977).

In determining whether a "fundamental" principle is at issue, a reviewing court looks primarily to the historical, uniform and continuing acceptance of the principle by the states. *Montana v. Egelhoff*, ___ U.S. ___, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996). Where the experience of the States has led to justifiable policy decisions regarding the exclusion of evidence, Due Process is not violated. "So long as the category of excluded evidence is selected on a basis that has good and traditional policy support, it ought to be valid." *Id.* at 2017 n.1. Where the reviewing court finds such justifiable and well-established reasons for the exclusion of evidence, it should conclude that the challenged statute or rule is constitutionally sound. *Id.* at 2020-2021.

The States, as well as the federal government, may require that, to be admissible at a trial, evidence not only be relevant but also reliable. Such a restriction does not impermissibly infringe on the right to present a defense.² "The accused does not have an unfettered right to offer

² The constitutional right to present a defense is not absolute. *Montana v. Egelhoff*, 116 S.Ct. at 2017. The right "'may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). Thus a criminal defendant may be compelled to comply with established rules governing the presentation of evidence in trial court proceedings. See *Chambers v. Mississippi*, 93 S.Ct. at 1049 (presentation of evidence is subject to compliance with "established rules of procedure and evidence"). Cf. *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, 134 L.Ed.2d 138 (1996) (due process violation where rule had no common law roots and only four states had adopted it).

The fact that evidence possesses bare probative value does not guarantee its admissibility. MCCORMICK ON EVIDENCE, VOL. I, §185, p. 779 (4TH ED. 1992). The common law authority of a court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" is codified in Rule 403 of the Federal and Uniform Rules of Evidence, and in the evidence codes and case law of every State.³

³ Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

At least thirty-five states have adopted codes of evidence analogous or identical to the Federal Rules of Evidence. See E. IMWINKELREID, "A BRIEF DEFENSE OF THE SUPREME COURT'S APPROACH TO THE INTERPRETATION OF THE FEDERAL RULES OF EVIDENCE," 27 IND. L. REV. 267, 267 n.5 (1993).

The traditional balancing of probative value and prejudicial impact focuses the court on the actual usefulness of the proffered evidence in the trial process. The balancing test necessarily embodies policies at the heart of trial court administration. To the extent that evidence may confuse, distract, mislead or overly influence the jury, the trial court may keep it out. Courts are particularly alert to these concerns when the evidence has the potential to intrude into the jury's primary task, which is to resolve credibility issues and the disputed historical facts of the case. See, Section I.D, *infra*.

To minimize the risk that the jury will be deterred from its primary task, courts often limit the admissibility of evidence directly addressing a witness' credibility. An example of such a limitation is the well-established rule against "bolstering" a witness' testimony until after credibility has been challenged. See MCCORMICK ON EVIDENCE, VOL. I, 47, P. 174 (4TH ED. 1992).

Another example of the legitimate exclusion of a category of evidence is embodied in Rule 608(a) of the Federal and Uniform Rules of Evidence, which precludes opinion testimony about an individual's credibility on a specific issue or a particular occasion.⁴

Hearsay rules also preclude the introduction of testimony that, while relevant, is not deemed sufficiently

⁴ Federal Rule of Evidence 608(a) provides in relevant part: (a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness . . .

reliable for consideration by the factfinder. See *Montana v. Egelhoff*, 116 S.Ct. at 2017 (discussing validity of evidentiary rules of exclusion).⁵

States that have adhered to an absolute bar against the admissibility of polygraph evidence have concluded that exclusion is proper because whatever probative value the evidence possesses is outweighed by its prejudicial impact. See text, *infra*. Because the exclusion of polygraph evidence is based on legitimate concerns about its adverse effect on the trial process, it does not impermissibly limit the right to present a defense.

Of course, States may not apply rules of evidence in a manner that violates a defendant's constitutional rights. Amici States agree with Petitioner, however, that a rule excluding polygraph evidence does not in any way restrict a defendant's right or ability to testify, *Rock v. Arkansas*, *supra*; or prevent a defendant from presenting favorable witnesses, *Chambers v. Mississippi*, *supra*. The *per se* exclusion of polygraph evidence is based on the principles of law discussed in this Section, and on the compelling policy

⁵ Other exclusionary rules may be found in the limitations on testimony about syndromes such as rape trauma syndrome, post-traumatic stress disorder, and battered spouse syndrome. While experts may testify about the typical behavior patterns exhibited by persons with these disorders, they are usually precluded from testifying that a particular individual actually suffers or does not suffer from those disorders. See e.g., *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989) (where defendant raised self-defense claim and presented expert testimony explaining battered women's syndrome, jury could utilize expert's testimony to assess how "a reasonably prudent battered woman" would have reacted). See also *Arcoren v. United States*, 929 F.2d 1235, 1241 (8th Cir. 1991) (expert's testimony on battered woman's syndrome did not impinge on jury's role in determining credibility, where expert expressed no opinion on whether witness actually suffered from that disorder).

considerations which are discussed in Sections I.B through I.D, *infra*. Therefore the States' enforcement of a rule against the admissibility of polygraph evidence is constitutionally sound.⁶

B. State Courts Recognize That The Validity of Polygraph Test Results Has Not Been Established

There is significant disagreement among experts about the validity, or accuracy, of the results obtained in a polygraph examination. See MCCORMICK ON EVIDENCE, VOL. I, § 206, PP. 907-917 (4TH ED. 1992); UNITED STATES CONGRESS, OFFICE OF TECHNOLOGICAL ASSESSMENT, "SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION - A TECHNICAL MEMORANDUM," AT 4, 52, 96-97 (1983) (hereinafter OTA

⁶ State courts have considered and rejected constitutional challenges to the exclusion of polygraph evidence. See, e.g., *Haakanson v. State*, 760 P.2d at 1033 n.3 (distinguishing *Rock v. Arkansas*); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996) (distinguishing *Rock v. Arkansas*); *People v. Fudge*, 7 Cal.4th at 1122-23 (no due process violation); *State v. Porter*, 241 Conn. at 133-34 (no sixth amendment or due process violation); *Paxton v. State*, 867 P.2d 1309, 1323-24 (Okla. Cr. App. 1993) (no violation of right to testify or to present a defense); *Perkins v. State*, 902 S.W.2d at 94 (no sixth amendment or due process violation); *State v. Ahlfinger*, 749 P.2d 190 (Wash. App. 1988) (distinguishing *Rock v. Arkansas*).

Memo) (polygraph reliability unproven and in dispute).⁷ See generally, *State v. Porter*, 241 Conn. at 104-113.

Polygraphs are dissimilar to other kinds of scientific evidence such as fingerprint analysis, ballistic examination, blood typing, and DNA typing which are objectively and mechanically quantifiable by tests of recognized validity. Empirical studies and laboratory simulation studies attempting to demonstrate the accuracy of polygraph tests have serious methodological weaknesses that undermine the validity of their data. See generally, *State v. Porter*, 241 Conn. at 104-109 (discussing studies).

Unlike standard medical or scientific tests, there is no definitive method by which to examine polygraph results as a means of verifying them. OTA Memo at 7-8 (polygraph research difficult to design and conduct; accuracy obtained in one situation may not generalize to others). Thus it is difficult if not impossible to assess accurately the actual probative value of polygraph tests. *State v. Porter, supra*; see *Pulakis v. State*, 476 P.2d 474 (Alaska 1970) (polygraph proponents have not yet developed persuasive data demonstrating reliability).

Unlike standard medical or scientific test results which measure objective data, the interpretation of polygraph tests is replete with subjectivity. While the polygraph

⁷ The OTA study concluded that a polygraph detects deception "better than chance," but with error rates that could be considered "high" or "significant." OTA Memo at 52, 97. The term "validity" refers to a test's accuracy -- its actual ability to do what it says it does. MCCORMICK ON EVIDENCE, VOL. I, §204, P. 877 N. 51 (4TH ED. 1992). By contrast, "reliability" refers to the reproducibility, or consistency, of results. OTA Memo at 50. In the polygraph context, "reliability is important, but the polygraph debate really centers around the test's validity" i.e., its actual ability to detect deception. *State v. Porter*, 241 Conn. at 104 and n. 46.

machine measures and records a subject's physical responses during a question and answer session, the instrument itself cannot detect deception. OTA Memo at 6, 11. The measurements must be interpreted by the polygraph examiner, who attempts to draw a correlation between the physiological data and the presence or absence of deception in the subject. The interpretations of the polygraph's measurements by the examiner form the crux of the results of such a test. In fact, "the single most important variable affecting the accuracy of the polygraph test result [is] the polygraph examiner." *State v. Souel*, 53 Ohio St. 2d 123, 133, 372 N.E.2d 1318, 1323-1324 (1978); accord, *State v. Grier*, 307 N.C. at 635; *People v. Anderson*, 637 P.2d at 361; see M. ABELL, "POLYGRAPH EVIDENCE: THE CASE AGAINST ADMISSIBILITY IN FEDERAL CRIMINAL TRIALS," 15 AM. CRIM. L. REV. 29, 41 (1977) (polygraphs lack the reliability of objective forensic tests due to subjective nature of interpretation).

A polygraph examiner purports to ascertain a subject's veracity indirectly, through interpretations of the measurements of physiological data exhibited during the subject's response to a series of questions. The questions are created by the examiner for each individual test and thus may be crafted (by the examiner or those arranging for the test) to achieve a desired result. Moreover, a pretest may be administered, or the testing procedure may be explained in advance to the subject. Intended or not, such interventions may skew the results.

Polygraph examiners who administer the test are required in many States to obtain a license, but, while there are more than thirty schools offering training courses ranging from seven to fourteen weeks, there are no uniform standards for training examiners and no uniform test procedures. See *State v. Porter*, 241 Conn. at 97-103 (types of tests); *Haakanson v. State*, 760 P.2d at 1034 (polygraph

examiner not member of relevant scientific community, but rather a technician or operator); OTA Memo at 83-84; N. ANSLEY & L. BEAUMONT, QUICK REFERENCE GUIDE TO POLYGRAPH ADMISSIBILITY, LICENSING LAWS, AND LIMITING LAWS (16TH ED. 1992). It is acknowledged in the literature that a substantial number of examiners may lack adequate training and competence. See e.g., D. RASKIN, "THE POLYGRAPH IN 1986: PROFESSIONAL AND LEGAL ISSUES SURROUNDING APPLICATION AND ACCEPTANCE OF POLYGRAPH EVIDENCE," 1986 UTAH L.REV. 29, 66-67 (1986).

Nevertheless, it is possible that even an inadequately trained examiner may reach an accurate conclusion about the veracity of a particular subject. But it cannot yet be demonstrated that the accuracy of that conclusion derives from the polygraph instrument, as opposed to chance or to the examiner's own subjective perceptions and impressions of the subject. See D. CARROLL, "HOW ACCURATE IS POLYGRAPH LIE DETECTION?" IN THE POLYGRAPH TEST: LIES, TRUTH AND SCIENCE," (A. GALE ED. 1988) at pp. 19, 28. However, if the examiner's opinion about veracity was not based on objective, scientific principles, then it should not be admitted. *State v. Porter*, 241 Conn. at 120.

Another concern about reliability arises from the existence of countermeasures that subjects can learn and utilize to undermine whatever accuracy the polygraph test might possess. In *State v. Dery*, the Rhode Island Supreme Court described an expert's testimony about countermeasures by which a subject could deceive the polygraph examiner. 545 A.2d at 1016. These methods include tightening of muscles such as sphincters, squeezing one's toes, taking certain drugs or controlling one's thoughts to promote relaxation. The expert testified that even experienced polygraph examiners were unable to detect such countermeasures. *Id.* See *State v. Porter*, 241 Conn. at 113-114 (in all studies, more than fifty per cent of the

examiners' conclusions about subjects who had received countermeasure instruction were incorrect); *United States v. Piccinonna*, 885 F.2d 1520, 1538 n.3 (11th Cir. 1989) (Johnson, J. dissenting) (CITING GUDJONSSON, "HOW TO DEFEAT THE POLYGRAPH TEST" IN THE POLYGRAPH TEST: LIES, TRUTH AND SCIENCE (A GALE ED. 1988)); OTA Memo at 88 (test measurements can be affected through drug usage by subject and pressing toes against floor); D. LYKKEN, "THE VALIDITY OF TESTS: CAVEAT EMPTOR," 27 JURIMETRICS J. 263, 267 (1987) ("[T]here is a simple, easily learned technique with which a guilty person can 'beat' the control question test"). There exists a real possibility that, if polygraphs were routinely admissible in court, such countermeasures will become widely utilized.⁸

⁸ In *State v. Porter*, the Connecticut Supreme Court questioned whether training in countermeasures is difficult to obtain, and, if so, "whether it would remain the case if polygraph examination of witnesses became common, especially given the apparent brevity and simplicity of the training in question." *State v. Porter*, 241 Conn. at 114.

A recent foray into the Internet via AmericaOnLine using the search word "polygraph" resulted in 2100 entries, including one entitled "How To Beat A Lie Detector") <http://members.aol.com/revenantpr/Impaler/lie.htm>. After briefly describing the type of questions involved in a polygraph examination, the creator of this site advises that a subject's goal should be to cause stress during the "control" questions by flexing one's biceps or holding one's breath, thus skewing the examiner's comparison with responses to the "relevant" questions on the test.

Another entry, entitled "How To Sting The Polygraph", was found at <http://www.polygraph.com>. The creator of this site offers to send the reader a handbook on countermeasures at the price of forty dollars.

While the actual validity of the information offered by these particular sites is open to question, their very existence and availability indicates that a nascent cottage industry may be developing for such training.

Considered separately or together, the foregoing concerns about the polygraph's validity should inform any determination about admissibility or exclusion. "[A]lthough the probative value of the polygraph test may be greater than a coin toss, it is not significantly greater, especially for failed tests." *State v. Porter*, 241 Conn. at 112.⁹ Until methodology and technique are improved, procedures are standardized, uniform qualifications for examiners are adopted, and the test is insulated against countermeasures, the validity of polygraph results remains highly questionable. Lack of proven validity therefore provides a legitimate ground for the *per se* exclusion of polygraph evidence.¹⁰

C. The States' Experience Has Confirmed The Significant Potential For Undue Delay And Court Congestion In The Absence Of A *Per Se* Rule Of Exclusion

If polygraph evidence were admissible, trial time would lengthen because in each individual case a trial court would have to hold a hearing on the validity of the test, the testing procedures utilized, the qualifications of the

⁹ The Supreme Court of Washington, in allowing the admission of polygraph evidence by stipulation, points out that the parties, "knowing that the degree of reliability is open to question, in effect gamble that the test will prove favorable to them. . . . The parties . . . by their stipulation waived any question as to the degree of the reliability of the polygraph." *State v. Renfro*, 96 Wash.2d 902, 906, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982).

¹⁰ In *State v. Porter*, the Connecticut Supreme Court acknowledged that "lie detection technology continues to evolve," and indicated that, if presented at some future date with evidence indicating that "lie detection technique has reached a sufficiently high level of validity that the probative value of such evidence potentially outweighs its prejudicial impact," the Court would revisit the issue. 241 Conn. at 136.

examiner, the conditions under which the test was administered, and the content of the questions asked of the subject during the test. Thus evidentiary hearings for the admissibility of particular polygraph test results are likely to require even more time than for standard scientific evidence.

With standard scientific and medical evidence, there are recognized, established tests and procedures that are accepted as providing accurate results. At a typical hearing on the admissibility of scientific evidence, the expert testifies about whether those established procedures were properly performed and about the results they yield.

Polygraph evidence is different. Because of the lack of standardization, the validity of the test instruments and the test procedures will have to be examined in each case. Moreover, the qualifications of each polygraph examiner will almost certainly be challenged because of the lack of uniform standards and the questionable adequacy of training in the field. See Section I.B, *supra*. Because the test questions are crafted for each individual test, challenges to the formulation, order and content of those questions are almost inevitable in every case. Because the validity of the test, and not just the testing procedures, will be an issue every time, evidentiary hearings could degenerate into time-consuming battles of opposing experts. Finally, because of the individual content and subjective interpretation of polygraph tests, the length of evidentiary hearings will not likely decrease even as courts become more familiar with proffers of polygraph evidence over time.

Several States experimented with admitting polygraph evidence before reverting to a *per se* rule of exclusion. See *Commonwealth v. Mendes*, 406 Mass. 201, 547 N.E. 2d 35 (1989); *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *State v. Dean*, 103 Wis.2d 228, 307 N.W.2d 628 (1981); *Fulton v. State*, 541 P.2d 871, 872 (Okla. 1975). Their experience supports the conclusion that the investment

of time and trial court resources required to determine admissibility is not warranted where the probative value of polygraph evidence is minimal or dubious, and the prejudicial impact is high.

In *Mendes*, Massachusetts ended a fifteen year experiment with admitting polygraph evidence, pointing to the subjective nature of the testing; its uncertain validity; the dangers of confusing the jury and usurping its role; and the continued burden on trial courts to conduct lengthy evidentiary hearings. 406 Mass. at 211.¹¹ "Fifteen years has been more than enough time for examination and evaluation. . . . Further hope or expectation . . . is no longer warranted. . . . Accordingly, supported by the overwhelming authority throughout the country, we announce that polygraphic evidence, with or without pretest stipulation, is inadmissible in criminal trials in this Commonwealth." *Id.* at 212.

In *Grier*, the North Carolina Supreme Court reinstated its *per se* rule of exclusion, saying, "[T]he administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered. If a trial court were to adequately police the reliability of stipulated results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable." *State v. Grier*, 307 N.C. at 642-3.

¹¹ The hearing in *Mendes* took four days of trial court time. 406 Mass. at 202. In that State, even after fifteen years of admitting polygraph evidence, the trial court still had to start from the beginning of the polygraph inquiry, because of the unique and subjective nature of such evidence. See Section I.B, *supra*, of this brief; see also *Brown v. Darcy*, 783 F.2d 1389, 1397 (9th Cir. 1986) (polygraph admissibility hearing took two days of eight day trial).

Wisconsin reinstated a *per se* rule of exclusion after seven years of admitting polygraph evidence on stipulation with strict conditions. *State v. Dean*, 103 Wis. 2d at 279. The Wisconsin Supreme Court concluded that the conditions it had previously placed on admissibility had failed "to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do." *State v. Dean*, 103 Wis. 2d at 279.

After a year of admitting polygraph evidence by stipulation, the Oklahoma Supreme Court reinstated a *per se* rule of exclusion, citing the unreliability of polygraph evidence. *Fulton v. State*, 541 P.2d at 872.

The negative effect on the administration of criminal justice of even a limited rule of admissibility for polygraph evidence is evident in the experience of the foregoing States. In this context, a *per se* rule of exclusion is neither arbitrary nor unjustified, given the at best minimal probative value of polygraph test results. See Section I.B, *supra*.

D. States Have A Legitimate Concern That Polygraph Evidence Will Impermissibly Infringe On The Province Of The Jury¹² To Determine Credibility

Testimony about polygraph test results is unique in that it expresses an opinion on the credibility of a witness. Because there is no basis for concluding that such testimony provides a better determination of credibility than the personal observation and assessment of each juror, allowing polygraph evidence in trials is a direct invasion of the province of the jury.

Scientific testimony is admitted to assist jurors in understanding matters that are not within their personal knowledge and that they cannot assess on their own. See Section II, *infra*. By contrast, the testimony of a polygrapher does not add or explain relevant facts that jurors would be unable to infer on their own. Rather, it is an opinion about the veracity of a particular witness. But a determination whether a witness is credible is well within the understanding and ability of the average juror without assistance. A juror is capable of assessing a witness' body language, manner, tone of voice and other physical manifestations during testimony in order to make a determination about veracity. "[F]orming impressions and intuitions regarding witnesses is the quintessential jury function." *State v. Porter*, 241 Conn. at 120. Thus the testimony of a polygrapher is not necessary to assist the jurors in understanding a concept with which they have no experience or ability to understand.

Even more troubling is the fact that the testimony of a polygraph examiner is an opinion on the ultimate issue of

¹² The analysis employed in this section applies with equal force to the judge as factfinder in a trial to the court.

guilt or innocence. While experts in disciplines such as fingerprint analysis, DNA testing or ballistics testify about and explain the results of such tests, they are not permitted to render a conclusion about a criminal defendant's guilt or innocence. Jurors are free to disregard expert scientific evidence and focus on other factual evidence that proves or disproves the prosecution's case. But jurors must always evaluate credibility and therefore will not be able to ignore or disregard polygraph evidence as easily. If such evidence is routinely admitted, polygraphers may preempt jurors in the area of credibility determinations.

Jurors might be unduly influenced by the opinion of a single "expert" and thus abrogate their collective function to determine credibility. "We afford criminal defendants the right to trial by a panel of several jurors partly out of the recognition that, although one person may be misled when a witness gives the 'incorrect' physical signals, the cumulative impressions of the group are likely to lead to the truth." *State v. Porter*, 241 Conn. at 119.¹³ "The mention of polygraphs in the presence of the jury impermissibly suggests that there is a scientific way to find the truth where in reality, the jury decides what is true and what is not." *Robinson v. Commonwealth*, 231 Va. at 155; accord, *State v. Ober*, 493 A.2d at 493 (danger that jury will rely on test results to establish credibility); *State v. Brown*, 297 Or. at 445 (potential for misuse or over-valuation by jury).

¹³ Studies about the actual effect of polygraph evidence on jurors are limited in number and inconclusive. See *State v. Porter*, 241 Conn. at 117-118 (reviewing studies). "In view of the importance of maintaining the role of the jury, this uncertainty alone justifies the continued exclusion of polygraph evidence." *Id.* at 118.

II. THE DAUBERT STANDARD DOES NOT REQUIRE INVALIDATION OF RULES EXCLUDING POLYGRAPH EVIDENCE

In *Scheffer*, the court noted that Rule 707 precluded the defendant from an opportunity to show that polygraph evidence might satisfy the federal test for the admissibility of scientific evidence established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.ed.2d 469 (1993).

In *Daubert*, this Court discarded the "general acceptance" test first adopted in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); as incompatible with Rule 702 of the Federal Rules of Evidence.¹⁴ In its place, this Court formulated a new standard which requires that the focus of a court's assessment of the validity of proffered scientific evidence "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.¹⁵ If the methodology meets some minimum standard of validity and it will "assist the

¹⁴ Rule 702 provides: **TESTIMONY BY EXPERTS.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¹⁵ The proponent of the evidence must demonstrate, however, that an expert's conclusions and testimony are actually derived from that methodology. *Daubert*, 509 U.S. at 591. Moreover, although "general acceptance" is no longer a requirement for admissibility, it is still a factor which courts employing a *Daubert* analysis can and should consider. *State v. Porter*, 241 Conn. at 84-85; *Commonwealth v. Lannigan*, 419 Mass. 15, 26, 641 N.E.2d 1342 (1994); see AMERICAN COLLEGE OF TRIAL LAWYERS REPORT, "STANDARDS AND PROCEDURES FOR DETERMINING THE ADMISSIBILITY OF EXPERT EVIDENCE AFTER DAUBERT," 157 F.R.D. 571, 574 (1995).

trier of fact," the evidence meets the threshold for admissibility. *Id.* at 589.

States that have considered the admissibility of polygraph evidence under a standard analogous to Daubert or Federal Rule of Evidence 702 have held that it should be excluded *per se* because its prejudicial impact outweighs whatever probative value it possesses. See *State v. Porter*, 241 Conn. at 75-76, 93-94 (assuming polygraph evidence meets Daubert's threshold requirement, court retains *per se* rule of exclusion because of prejudicial impact); *In Re Odell*, 672 A.2d at 459 (reaffirming Rhode Island's rule excluding polygraph evidence as "consistent with the opinion of the Supreme Court in *Daubert*"); *Perkins v. State*, 902 S.W.2d at 92-93 (polygraph evidence inadmissible in Texas even after abandonment of *Frye* because it impermissibly decides an issue for the jury); *State v. Beard*, 194 W.Va. at 745-746 (polygraph evidence still inadmissible after Daubert because of its unreliability); *State v. Brown*, 297 Or. at 433 (valid reasons preclude admissibility of polygraph evidence even if it satisfies requirements of Rules 401 and 702).¹⁶

¹⁶ Because *Daubert* was based on an interpretation of Federal Rule of Evidence 702, it is not binding on the States. Nevertheless, many states have discarded *Frye* in favor of the validity standard embodied in *Daubert*. See *State v. Porter*, 241 Conn. at 76-77 and n.20 (citing cases).

But several states still retain the *Frye* test. See, e.g., *State v. Flanagan*, 625 So.2d 827 (Fla. 1993); *People v. DalCollo*, 669 N.E.2d 378 (Ill.App. 2d Dist.), cert. denied, 675 N.E.2d 635 (Ill. 1996); *Armstead v. State*, 673 A.2d 221 (Md. 1996); *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989); *State v. Dean*, 523 N.W.2d 681 (Neb. 1994); *State v. Vandebogart*, 616 A.2d 483 (N.H. 1992); *Commonwealth v. Crews*, 640 A.2d 395, 400 n.2 (Pa. 1994).

California and New York have expressly rejected *Daubert* in favor of the *Frye* test. See *People v. Leahy*, 8 Cal.4th 587, 595, 882 P.2d 321, 34 Cal. Rptr. 2d 663 (1994); *People v. Wesley*, 83 N.Y.2d (continued...)

As these cases recognize, simply crossing Daubert's threshold does not automatically guarantee admissibility. *Daubert*, 509 U.S. at 595. Scientific evidence is still subject to the limitations and requirements imposed by the rules of evidence. In particular, the evidence must be not only relevant, but reliable and more probative than prejudicial. See Section I, *supra*. The relevant inquiry, then, is not whether polygraph evidence passes the *Daubert* threshold, but, assuming it possesses some degree of probative value, whether there are nevertheless valid reasons for excluding it on grounds that it is unduly prejudicial. As the cases demonstrate, the States have continued to limit the admissibility of polygraph evidence because the significant policy concerns discussed in Section I of this brief have not been resolved.

Some federal courts have discarded their *per se* rules against the admissibility of polygraph evidence in light of *Daubert*. See e.g., *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); *United States v. Piccinonna*, 885 F.2d 1520 (11th Cir. 1989); *United States v. Crumby*, 895 F.Supp. 1354 (D. Ariz. 1995). These courts focus on Daubert's threshold requirement for admitting scientific evidence, but give too little consideration to the important policies and concerns about unreliability and prejudice that nevertheless justify excluding it. They perform an incomplete analysis by failing to determine whether the evidence, even if probative,

¹⁶(...continued)

417, 423, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

Some states have fashioned their own tests for the admissibility of scientific evidence. See, e.g., *State v. Montalbo*, 828 P.2d 1274, 1279 (Haw. 1992); *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); *State v. Jones*, 259 S.E.2d 120 (S.C. 1979); *State v. Morgan*, 485 S.E.2d 112 (S.C. Ct. App. 1997).

satisfies other applicable rules of evidence.¹⁷ *Daubert* does not require the result reached by these courts and by the *Scheffer* court.

There is no requirement that state and federal courts have uniform standards for the admissibility of evidence. This Court "should be cautious about constitutionalizing every procedural device found useful in federal courts," thereby precluding the individual States from formulating legitimate rules based on tradition and experience. *Crist v. Bretz*, 437 U.S. 29, 98 S.Ct. 2156, 2163, 57 L.Ed.2d 24 (1978) (Burger, C.J., dissenting). This Court "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. at 201. The States, which have considered and reconsidered the admissibility of polygraph evidence over the seventy-plus years since *Frye* was decided, have continued to reject it. This Court should not disregard the collective wisdom and experience of the States in order to affirm *Scheffer*.

¹⁷ In *Piccinonna*, the Court of Appeals modified its *per se* rule excluding polygraph evidence and remanded for the district court's consideration of admissibility. The district court again excluded the polygraph evidence, on the ground that it failed to satisfy Federal Rule of Evidence 608(a). *United States v. Piccinonna*, 729 F.Supp. 1336 (S.D. Fla. 1990), *aff'd* 925 F.2d 1474 (11th Cir. 1991); cf. *United States v. Black*, 831 F.Supp. 120, 122-123 (E.D.N.Y. 1993) (upholding exclusion without a hearing where polygraph evidence satisfying Rules 401 and 702 held not sufficiently reliable for admissibility under *Daubert*).

CONCLUSION

For all of the foregoing reasons, the amici States respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Armed Services and hold that a *per se* rule barring admission of polygraph evidence is not unconstitutional.

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